



ENVIRONMENTAL PROTECTION AGENCY

[EPA-R10-OW-2022-0418; FRL 10624-01-OW]

Final Determination to Prohibit the Specification of and Restrict the Use for Specification of Certain Waters Within Defined Areas as Disposal Sites; Pebble Deposit Area, Southwest Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: Pursuant to Section 404(c) of the Clean Water Act (CWA), the Environmental Protection Agency (EPA) is issuing a Final Determination to prohibit the specification of and restrict the use for specification of certain waters in the South Fork Koktuli River (SFK), North Fork Koktuli River (NFK), and Upper Talarik Creek (UTC) watersheds as disposal sites for certain discharges of dredged or fill material associated with developing the Pebble deposit, a copper-, gold-, and molybdenum-bearing ore body located in Southwest, Alaska.

FOR FURTHER INFORMATION CONTACT: For information concerning the Final Determination, contact Palmer Hough, Oceans, Wetlands and Communities Branch, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number (202) 566-1374; email address: hough.palmer@epa.gov. For more information about EPA's efforts in Bristol Bay and to review the CWA Section 404(c) Final Determination, see <http://www.epa.gov/bristolbay>.

SUPPLEMENTARY INFORMATION:

I. Clean Water Act Section 404(c) Review Process

The EPA's mission is to protect human health and the environment. The CWA, the objective of which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C 1251(a), is essential to EPA's mission and establishes the basic structure for

regulating discharges of pollutants into waters of the United States. To advance this overall objective, Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant by any person into waters of the United States except as authorized by specific provisions of the Act, including a permit issued pursuant to Section 402 or 404, 33 U.S.C. 1342; 33 U.S.C. 1344. Section 404(a) of the CWA authorizes the United States Army Corps of Engineers (USACE) to issue permits for the discharge of dredged or fill material into waters of the United States at specified disposal sites. 33 U.S.C. 1344(a). Section 404(b) provides, subject to Section 404(c) of the CWA, each such disposal site shall be specified for each such permit by USACE. 33 U.S.C. 1344(a). 33 U.S.C. 1344(b). Section 404(c) of the CWA authorizes the EPA to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever it determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. 33 U.S.C. 1344(c). The EPA's regulations at 40 CFR part 231 govern the Agency's exercise of its CWA Section 404(c) authority.

II. Proposed Mine at the Pebble Deposit

The Pebble deposit in Southwest Alaska is a large, low-grade copper-, gold-, and molybdenum-bearing ore body deposit located at the headwaters of the largely undeveloped Bristol Bay watershed that underlies portions of the SFK, NFK, and UTC watersheds, which drain to two of the largest rivers in the Bristol Bay watershed, the Nushagak and Kvichak Rivers.

In December 2017, Pebble Limited Partnership (PLP) submitted a CWA Section 404 permit application to USACE to develop a mine at the Pebble deposit that triggered the development of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act

(NEPA). In response to the CWA Section 404 permit review and NEPA processes, PLP submitted a revised permit application to USACE in June 2020 (i.e., the 2020 Mine Plan). On July 24, 2020, 85 FR 44890, USACE published a Notice of Availability for the Final EIS (FEIS) in the *Federal Register* and on November 20, 2020, USACE issued its Record of Decision (ROD) denying PLP's CWA Section 404 permit application on the basis that the 2020 Mine Plan would not comply with the CWA Section 404(b)(1) Guidelines and would be contrary to the public interest. By letter dated November 25, 2020, USACE notified PLP that the proposed project failed to comply with the CWA Section 404(b)(1) Guidelines because "the proposed project would cause unavoidable adverse impacts to aquatic resources which would result in Significant Degradation to aquatic resources."

III. 2022 Proposed Determination

In January 2022, consistent with its regulatory procedures for proposed determinations at 40 CFR 231.3(a), EPA Region 10 notified USACE, the Alaska Department of Natural Resources (ADNR), PLP, Pebble East Claims Corporation, Pebble West Claims Corporation, and Chuchuna Minerals (the Parties) of EPA Region 10's intention to issue a revised proposed determination because, based on a review of information available to that date, it continued to believe that the discharge of dredged or fill material associated with mining the Pebble deposit could result in unacceptable adverse effects on important fishery areas. EPA Region 10 provided the Parties with an opportunity to consult with the Region and to submit information for the record to demonstrate that no unacceptable adverse effects would result from discharges associated with mining the Pebble deposit or that actions could be taken to prevent unacceptable adverse effects on important fishery areas.

ADNR, PLP, and Chuchuna Minerals submitted response letters, and the EPA met individually with PLP and Chuchuna Minerals. None of the Parties demonstrated to the satisfaction of EPA Region 10 that no unacceptable adverse effects would occur as a result of the discharge of dredged or fill material associated with mining the Pebble deposit. Thus, EPA Region 10 decided

that the appropriate next step in this CWA Section 404(c) process was the publication of a revised proposed determination (the 2022 Proposed Determination).

Accordingly, on May 26, 2022, EPA Region 10 published in the *Federal Register* a notice of availability and notice of public hearings for the 2022 Proposed Determination for the Pebble Deposit Area, Southwest Alaska issued pursuant to Section 404(c) of the Clean Water Act (CWA) (87 FR 32021). On June 16 and 17, 2022, the EPA Region 10 held three public hearings. On June 30, 2022, the EPA published in the *Federal Register* a Notice of extension of public comment period and public hearing comment period through September 6, 2022 (87 FR 39091). On September 6, 2022, EPA Region 10 published in the *Federal Register* a notice to extend the time period provided in 40 CFR 231.5(a) to either withdraw the proposed determination or to prepare a recommended determination through no later than December 2, 2022, to help ensure full consideration of the extensive administrative record, including all public comments (87 FR 54498, September 6, 2022). In addition to the testimony taken at the hearings, EPA Region 10 received more than 582,000 written comments during the public comment period.

IV. Recommended Determination

EPA Region 10 completed its review of the extensive administrative record, including all public comments, and the Regional Administrator determined that the discharge of dredged or fill material associated with developing the Pebble deposit would be likely to result in unacceptable adverse effects on anadromous fishery areas. Accordingly, EPA Region 10 prepared, and on December 1, 2022, transmitted to the EPA's Assistant Administrator for Water a Recommended Determination, along with the administrative record, for review and final action.

On December 2, 2022, the Assistant Administrator for Water notified the Parties that she had received EPA Region 10's Recommended Determination and, consistent with the EPA's CWA Section 404(c) regulations at 40 CFR 231.6, provided them the opportunity to notify the EPA of their intent to take corrective action to prevent unacceptable adverse effects on anadromous

fishery areas from certain discharges of dredged or fill material associated with developing the Pebble deposit.

ADNR, PLP, USACE, and Chuchuna Minerals submitted written responses to the EPA's notification letters. ADNR also requested a meeting with the EPA. The EPA met with ADNR and other representatives from the State of Alaska. None of the Parties identified corrective action to prevent unacceptable adverse effects satisfactory to the Assistant Administrator for Water.

After reviewing EPA Region 10's Recommended Determination; the extensive administrative record supporting the Regional Administrator's decision, including all public comments; letters from ADNR, PLP, Chuchuna Minerals, and USACE; and considering the information provided during the Agency's meeting with the State of Alaska, the Assistant Administrator for Water has determined that certain discharges of dredged or fill material associated with developing the Pebble deposit into certain waters of the United States will have unacceptable adverse effects on anadromous fishery areas and affirms the Recommended Determination.

V. Final Determination

Based on information in PLP's CWA Section 404 permit application, the FEIS, and the ROD, discharges of dredged or fill material to construct and operate the 2020 Mine Plan's proposed mine site would result in the permanent loss of approximately 8.5 miles (13.7 km) of anadromous fish streams, 91 miles (147 km) of additional streams that support anadromous fish streams, and approximately 2,108 acres (8.5 km²) of wetlands and other waters in the SFK and NFK watersheds that support anadromous fish streams. These discharges would also result in streamflow alterations that would adversely affect approximately 29 miles (46.7 km) of additional anadromous fish streams downstream of the mine site due to greater than 20 percent changes in average monthly streamflow.

The EPA has determined that the large-scale loss of and damage to headwater streams, wetlands, and other aquatic resources that support salmon populations in the SFK and NFK watersheds

from the discharge of dredged or fill material for the construction and routine operation of the 2020 Mine Plan will have unacceptable adverse effects on anadromous fishery areas in the SFK and NFK watersheds. The EPA has also determined that discharges of dredged or fill material for the construction and routine operation of a mine to develop the Pebble deposit anywhere in the mine site area that would result in the same or greater levels of loss or streamflow changes as the 2020 Mine Plan also will have unacceptable adverse effects on anadromous fishery areas in the SFK and NFK watersheds, because such discharges would involve the same aquatic resources characterized as part of the evaluation of the 2020 Mine Plan.

To prevent these unacceptable adverse effects, the Final Determination prohibits the specification of certain waters of the United States in the SFK and NFK watersheds as disposal sites for the discharge of dredged or fill material for the construction and routine operation of the 2020 Mine Plan, including future proposals to construct and operate a mine to develop the Pebble deposit with discharges of dredged or fill material into waters of the United States that would result in the same or greater levels of aquatic resource loss or streamflow changes as the 2020 Mine Plan. The Defined Area for Prohibition encompasses certain headwaters of the SFK and NFK watersheds and is delineated by the entirety of the Public Land Survey System (PLSS) quarter sections where mine site discharges were proposed in PLP's 2020 Mine Plan.

Separately, the EPA has also determined that discharges of dredged or fill material associated with future proposals to construct and operate a mine to develop the Pebble deposit will have unacceptable adverse effects on anadromous fishery areas (including spawning and breeding areas) anywhere in the SFK, NFK, and UTC watersheds if the adverse effects of such discharges are similar or greater in nature and magnitude to the adverse effects of the 2020 Mine Plan.

To prevent these unacceptable adverse effects, the Final Determination restricts the use for specification of certain waters of the United States in the SFK, NFK, and UTC watersheds as disposal sites for the discharge of dredged or fill material associated with future proposals to construct and operate a mine to develop the Pebble deposit with discharges of dredged or fill

material into waters of the United States that would result in adverse effects similar or greater in nature and magnitude to the adverse effects of the 2020 Mine Plan. The Defined Area for Restriction encompasses certain headwaters of the SFK, NFK, and UTC watersheds where discharges associated with developing the Pebble deposit are likely. To the extent that future discharges are subject to the prohibition, the restriction will not apply.

The aquatic resources that would be lost or damaged by the discharges evaluated by the EPA play an important role in supporting salmon populations in the SFK, NFK, and UTC watersheds. Such resources are also integral components of a larger ecosystem, which helps support the health of the Bristol Bay watershed, an area of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America. The watershed is made up of intact, connected habitats—from headwaters to ocean—that support abundant, genetically diverse wild Pacific salmon populations. The Bristol Bay watershed’s Sockeye Salmon run is the world’s largest, producing approximately half of the world’s Sockeye Salmon. The watershed’s Chinook, Coho, Chum, and Pink salmon populations are also significant. Bristol Bay’s salmon populations support world-class, economically important commercial and sport fisheries, as well as a more than 4,000-year-old subsistence-based way of life for Alaska Natives.

Proposals to discharge dredged or fill material into waters of the United States associated with developing the Pebble deposit that are not subject to this final determination remain subject to all statutory and regulatory authorities and requirements under CWA Section 404.

Considering the immense and unique economic, social, cultural, and ecological value of the aquatic resources in the region, including the fishery areas in the SFK, NFK, and UTC watersheds and their susceptibility to damage, the EPA will carefully evaluate all future proposals to discharge dredged or fill material in the region.

Radhika Fox,

Assistant Administrator.

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